No. 15-5238

In The
Supreme Court of the United States

LESTER RAY NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Sex Offender Registration and Notification Act ("SORNA") requires a sex offender to register or update his registration not later than three business days after a change of residence, and to do so in a jurisdiction where the offender presently resides, works, or attends school. 42 U.S.C. § 16913(c). But SORNA does not apply in foreign countries. 42 U.S.C. § 16911(10). And, until recently, Congress did not include a provision within SORNA for the registration of sex offenders who leave the United States. Thus, when Lester Ray Nichols moved from Kansas to the Philippines, and did not otherwise work or attend school within the United States, SORNA's plain text did not require him to register or update his registration.

The government agrees that Mr. Nichols did not have to register in the Philippines. But it disagrees that Mr. Nichols was not required to update his Kansas registration to reflect his move to the Philippines. In practice, the government construes SORNA to require an offender to unregister in a former jurisdiction. The government advances this policy-based argument in order to ensure the accuracy of sex offender registries.

But the government is wrong that a plain-text reading of SORNA creates inaccurate registries. Each jurisdiction requires its sex offenders to report out-of-jurisdiction changes of residence. These requirements ensure the accuracy of sex offender registries. There

is no need to construe SORNA to include an analogous requirement not previously found within SORNA's text. This is especially true now that Congress has amended SORNA to include departure notification for international travel.

The government's construction of SORNA is inconsistent with its text in three critical respects. First, 42 U.S.C. § 16913(c) expressly requires an offender to register or update a registration in at least one jurisdiction where the offender resides, works, or attends school, and not, as the government contends, in a jurisdiction where "the offender continues to appear on its registry as a current resident." This Court presumes that Congress means what it actually says in a statute. There is no reason not to apply this fundamental canon of construction here.

Second, the government's construction of § 16913(c) misstates what is "current" information and renders meaningless the provision's timing requirements. It is the change itself that triggers a requirement to provide current information. The government's assertion that an offender who moves to a foreign country must update the information "before" the change occurs has no textual support. Congress could have structured § 16913(c) in this manner, as evidenced by § 16913(b), but it did not.

Third, the government misunderstands 42 U.S.C. § 16914(a)(3). This provision does not independently require an offender to report an anticipated change of residence before the change occurs. Instead, Congress

included the verb "will reside" to cover offenders who initially register while in prison. Congress wanted to ensure that those offenders initially reported their expected addresses after release from imprisonment. The government further errs when it conflates "will reside" with "will no longer reside." Those two phrases are not synonymous.

The government also misunderstands the statutory history, inaccurately describes its own guidelines, and unhelpfully invokes perceived problems with transient sex offenders. If nothing else, when the competing interpretations are weighed, the rule of lenity precludes the government's atextual construction of the statute.

ARGUMENT

I. The government's underlying premise is incorrect: a plain-text reading of SORNA does not risk the accuracy of sex offender registries.

1. In 1997, some nine years before SORNA was enacted, Congress directed the states to include departure notification[1] provisions within their own sex offender registry laws. Pet'r Br. 6. This federal requirement was aimed at sex offenders who moved

[1] A departure notification requirement is analogous to a requirement to unregister. The concepts are used interchangeably throughout this brief.

from one state to another state, and it directed the states to require those offenders "to report the change of address to the responsible agency in the State the person is leaving." 42 U.S.C. § 14071(b)(5) (1997). By the time Congress enacted SORNA in 2006, each state had enacted some form of departure notification provision. Pet'r Br. at 6-7. Accordingly, Congress had no need to include, and did not include, within SORNA a departure notification provision.

At present, the laws of each state and enumerated jurisdiction require departure notification.[2] Thus, a plain-text interpretation of SORNA does not result in inaccurate sex offender registries. If a sex offender who moves from a jurisdiction complies with the jurisdiction's provisions, the registries will contain accurate information. If the offender does not comply, the offender can be prosecuted for violating the jurisdiction's law.

In this case, for instance, Kansas criminalizes an offender's failure to provide departure notification. Kan. Stat. § 22-4905(g) (moves in general); Kan. Stat.

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[2] Pet'r Br. 6-7 n.1-2. Some statutes have been renumbered: Ala. Code § 15-20A-10(c)(1); Cal. Penal Code § 290.011; 730 Ill. Comp. Stat. 150/6; Ind. Code § 11-8-11-12; Iowa Code § 692A.104(2); Nev. Rev. Stat. § 179D.470(1); Or. Rev. Stat. § 181.806(3)(a)(B); Pa. Cons. Stat. § 9799.15(g)(2); Utah Code § 77-41-105(3); *see also* Me. Rev. Stat. tit. 34-A § 11222(5); Miss. Code § 45-33-29(1); Neb. Rev. Stat. § 29-4004(4); D.C. Code § 22-4014; 4 P.R. Laws § 536c; 9 Guam Code § 89.03(f)(1); Am. Samoa Code § 46.2801(b); 6 N. Mar. I. Code § 1369(a); 14 V.I. Code § 1724(c).

§ 22-4905(o) (international moves). The failure to provide such notification is punished as a mid-high severity level felony. Kan. Stat. § 22-4903. Thus, state law required Mr. Nichols to unregister in Kansas.

2. The legislative history does not support the government's position, as it suggests. The failure to construe § 16913 to require departure notification would not exacerbate the problem of "missing sex offenders." U.S. Br. 31. Congress sought to tackle this problem not by requiring a sex offender to unregister in the departure jurisdiction, but by requiring the offender to register in the arrival jurisdiction. The House Report cited by the government says that noncompliance "typically occurs when the sex offender moves from one State to another." H.R. Rep. No. 109-218, at 26 (2005) ("House Report"). "When a sex offender fails to register in a State in which he or she resides, there is no effective system by which the States can notify each other about the change in a sex offender's status." *Id.*

The reference to "a State in which he or she resides" is not the departure jurisdiction. If that were true, Congress would have attributed the problem of missing sex offenders to deficiencies in initial registration, not deficiencies in registration via interstate moves. The House Report is also concerned with an actual "change in a sex offender's status," not an anticipated change in status.

To solve this problem, the House Report continues, offenders must provide updated information

within, not before, five days of any change. *Id.* Moreover, "if the sex offender either moves to a new State, works in a new State, or attends school in a new State, the new State is required to notify the other State that the sex offender is doing so in that State." *Id.* Sex offenders would be subject to federal punishment when "they cross a State line and fail to comply with the sex offender registration and notification requirements contained in the legislation." *Id.* The House Report thus confirms that SORNA seeks accurate registries via updated information provided after a triggering change to present jurisdictions. Its aim is not to require offenders to unregister in departure jurisdictions. Congress has left that task to the jurisdictions themselves. *Id.*; 42 U.S.C. §§ 16913(c), 16921(b)(3).

3. The House Report also suggests that Congress had federalism concerns in mind when it drafted SORNA. These concerns are apparent within SORNA's text. *See, e.g.*, 18 U.S.C. § 2250(a)(2)(B) (requiring an interstate-travel element for state sex offenders); 42 U.S.C. § 16913(c) (requiring offenders to update registries only after a change of residence, etc.); 42 U.S.C. § 16925 (states need not comply with SORNA; penalty for noncompliance is loss of funds). Congress sensibly left to each state the power to unregister offenders *within* that state, knowing that, at the time it enacted SORNA, all states required some form of departure notification.

4. The government is also wrong to identify accurate registries as SORNA's "key purpose."

SORNA's key purpose is the protection of the public. 42 U.S.C. §§ 16901, 16911(10). Only recently did Congress amend SORNA to respond to concerns about international child sex tourism. Int'l Megan's Law to Prevent Demand for Child Sex Trafficking, H.R. 515 § 2, 114th Cong. (2015) (text available at U.S. Suppl. Br. 1a). Before this amendment, it was not inconsistent with SORNA's stated purpose to conclude that a sex offender who moves to a foreign country is not required to unregister in the departure jurisdiction. In practice, if Mr. Nichols had informed Kansas of his departure, Kansas would have removed his name from its public registry.[3] The failure to complete this ministerial task is not the threat Congress reacted to when it enacted SORNA. 42 U.S.C. § 16901.

5. If keeping accurate registries was the "key purpose" behind SORNA, offenders who time out of their registration requirements would have an obligation to unregister. But there is nothing in 42 U.S.C. § 16915, or elsewhere in SORNA, that requires an offender who has satisfied his reporting requirement to unregister. The jurisdictions surely complete this task, as they do with departure notification, § 16921(b)(3), thus ensuring that the registries remain accurate.

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[3] "[O]nce an offender moves out of the State of Kansas, they no longer appear on our public website." http://www.kbi.ks.gov/registeredoffender/FAQ.aspx#offenderMoves (last visited February 17, 2016).

6. Moreover, the registries contain "current" information about where an offender "resides." Pet'r Br. 37-39. The accuracy of this information is better ensured when actual changes are reported, as § 16913(c) requires, not anticipated changes. Under the government's construction, it is unclear when an offender must report an anticipated change, whether the offender must also unreport any cancelled anticipated changes, and, if so, when and how the offender must do so. Section 16913 answers none of these questions.

7. In the end, state and federal law work in tandem to ensure that the various registries contain accurate information and that offenders who fail to comply with such laws are punished. The government is thus correct that, at the time Mr. Nichols moved to the Philippines, a registered sex offender was not allowed to move out of the country without telling anyone and that a failure to do so was a crime. But it was not a federal crime (until recently).

II. The recent amendment to SORNA undermines the government's position.

Congress recently amended SORNA. Int'l Megan's Law, *supra*. The amendment is aimed at sex offenders who travel to foreign countries, *id.* § 2, an aim not formerly present within SORNA. As amended, SORNA requires sex offenders to provide notice of travel to foreign countries. *Id.* § 6. The amendment resolves the government's concerns about accurate

registries. There is now no reason to adopt the government's atextual construction of § 16913. Moreover, the amendment confirms that, if Congress had meant to include a departure notification provision at the time of SORNA's enactment, it would have done so, as it now has done. Pet'r Br. 53-55. The amendment undermines the government's argument in three other respects.

1. Section 16914(a) now contains an additional subsection requiring a sex offender to report foreign travel, including, *inter alia*, "anticipated dates[,] places of departure," and the destination "address or other contact information therein." Int'l Megan's Law § 6(a)(1)(B). If § 16914(a)(3) already required an offender to report a future address within a foreign country, as the government contends, Congress would have had no reason to add this provision. *See Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 57-58 (2006) (refusing to interpret a provision "in a way that negates its recent revision").

2. Section 16914 now contains an explicit "time and manner" provision, delegating to the Attorney General the authority to set forth time and manner requirements for offenders to report § 16914 information. Int'l Megan's Law § 6(a)(2). The amendment confirms, contrary to the government's position, that SORNA did not previously require an offender to report changes to § 16914 information at times other than initial registration, in-person verification, or following a § 16913(c) change. *See* Section IV(3),

infra. It further confirms, contrary to the government's position, that the Attorney General had no previous authority to promulgate time and manner requirements. Moreover, adopting the government's construction of § 16914(a)(3) as an independent departure notification requirement would risk coherence and consistency moving forward. *See Ali v. BOP*, 552 U.S. 214, 222 (2008) (courts must interpret recent amendments to "ensure that the statutory scheme is coherent and consistent"). Section 16914(a)(3) would duplicate what § 16914(c) now does.

3. 18 U.S.C. § 2250 now includes a criminal provision punishing sex offenders who are required to register under SORNA, who fail to provide departure notification of intended foreign travel, and who travel or attempt to travel to a foreign country. Int'l Megan's Law § 6(b)(2). This conduct is the conduct at issue here. If Congress just passed a statute to criminalize this conduct, then it was not criminal, or at least not sufficiently clear that it was criminal, prior to the passage of the new legislation. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

The government admits that SORNA now "capture[s] the kind of conduct underlying petitioner's offense." U.S. Suppl. Br. 3. It no longer needs this Court to adopt its proposed atextual construction of SORNA. And Congress did not enact the provision "just to state an already existing rule." *Stone*, 514 U.S. at 397 Its passage confirms that 18 U.S.C.

§ 2250, as it existed when Mr. Nichols moved to the Philippines, did not unambiguously criminalize his conduct, as the following explains.

III. The government's definition of an "involved" jurisdiction is not supported by the text.

The government advances a policy argument in this case. To the extent that it advances a textual argument at all, the argument rests not on text, but on "context." U.S. Br. 14. The government admits that, in its opinion, the text "does not accurately capture the meaning" of the statute. *Id.* 24. The government asks this Court to interpret § 16913(c)'s phrase "jurisdiction involved pursuant to subsection (a)" to include within its meaning any jurisdiction where "the offender continues to appear on its registry as a current resident." *Id.* In other words, an offender who appears on a registry as a current resident has a duty to unregister when he moves to a different jurisdiction.

1. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This is the "first" canon of statutory construction, and the one that "a court should always turn to before all others." *Id.* at 253. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254. If Congress truly wanted to

define "jurisdiction involved" to include each jurisdiction where "the offender continues to appear on its registry as a current resident," then Congress surely would have said so in such straightforward language. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 681 (2010). But it did not.

2. The "jurisdiction involved" in the phrase "at least 1 jurisdiction involved pursuant to subsection (a)" unambiguously identifies an "involved" jurisdiction as one enumerated in § 16913(a) ("each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student"). Thus, a sex offender who changes his name, residence, employment, or student status has three business days after this change to report it to at least one jurisdiction where the offender presently resides, where the offender is an employee, or where the offender is a student. As an example, if John Doe resides in State A, but works in State B, and John Doe moves to State C, he can report this change in person either to State B, where he works, or to State C, where he now presently resides. John Doe is not required to report the change to both jurisdictions. Nor is he required to travel back to State A, the departure jurisdiction, to report the change in person there. Instead, the registration jurisdiction (either State B or State C) would report the changes to State A. 42 U.S.C. § 16921(b)(3).

3. The government does not disagree. It admits that an offender can register in State C (the arrival jurisdiction), and, if he does so, he has no obligation

to unregister in State A (the departure jurisdiction). U.S. Br. 11, 21-22. The text supports this interpretation, but the text does not support the government's supplemental definition of the "involved" jurisdictions in § 16913(a). In support of its supplemental definition, the government cites just one provision – 42 U.S.C. § 16921(b)(3). U.S. Br. 24-25. But this provision does not require a sex offender to do anything. Instead, § 16921(b)(3) requires the registering jurisdiction to provide information to other jurisdictions. This provision thus undermines the government's argument. The jurisdiction, and not the offender, is required to notify the departure jurisdiction of the change, which explains why the offender himself need not provide this notification (and is surely not required to provide it). Pet'r Br. 57.

4. In *Carr v. United States*, 560 U.S. 438 (2010), the government made an atextual argument very similar to the one it makes now. The government asked this Court to interpret the phrase "is required to register under [SORNA]" as "'a shorthand way of identifying those persons who have a [sex-offense] conviction in the classes identified by SORNA.'" *Id.* at 447. This Court rejected the argument:

> [A]s the Government would have it, Congress used 12 words and two implied cross-references to establish that the first element of § 2250(a) is that a person has been convicted of a sex offense. Such contortions can scarcely be called "shorthand." It is far more sensible to conclude that Congress meant the

> first precondition to § 2250 liability to be the one it listed first: a "require[ment] to register under [SORNA]."

Id. So too here. The plain text controls. A "jurisdiction involved under subsection (a)" is "each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student," and is not any jurisdiction where an offender appears as a resident on its registry.[4]

5. The government makes no other argument that an offender still "resides" in Kansas "after" he abandons his Kansas residence. *Id.* For good reason, the government does not rely on the meaning of the term "resides." Congress expressly defined that term as the location of one's home or the place where the offender habitually lives. 42 U.S.C. § 16911(10); Pet'r Br. 25-31. Under this definition, a sex offender does not reside in a jurisdiction where he appears as a current resident on the sex offender registry unless he lives within that jurisdiction. Thus, the government sensibly admits that Mr. Nichols did not reside in Kansas after he abandoned his Kansas residence. U.S. Br. 16-17, 25. And if Mr. Nichols did not reside in Kansas after the change of residence, then Kansas was not an "involved" jurisdiction under a plain-text reading of § 16913(a).

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[4] The government responds to our reliance on *Carr* with a discussion of the specific holding of that case. U.S. Br. 26-28. But we cite *Carr* for its treatment of present-tense verbs, not because the case is factually analogous.

The government's ad hoc suggestion that Mr. Nichols *could have* unregistered "on his way out of town" or "by staying an extra day after moving out of his apartment" is beside the point. U.S. Br. 25. The question is whether Mr. Nichols failed to update his registration "as required by [SORNA]," 18 U.S.C. § 2250(a)(3), not as *permitted* by SORNA. Section 16913(c) does not require an offender to unregister in a jurisdiction "on his way out of town," but instead requires the offender to register in person when he reaches his new jurisdiction.[5]

IV. SORNA does not require a sex offender to unregister in the departure jurisdiction before the offender changes his residence.

The government's new fallback position – that a sex offender who cannot register in the arrival jurisdiction must unregister in the departure jurisdiction – is a novel interpretation of SORNA. The government did not present the argument below. The argument is unsound. It misconstrues the word "current," impermissibly reads the triggering event out of § 16913(c), and unwisely considers § 16914(a)(3) a stand-alone departure notification provision.

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[5] Contrary to the government's suggestion, sex offenders cannot give "concurrent notice in their departure jurisdiction." U.S. Br. 25. Section 16913(c) requires in-person registration. Unless the sex offender resides at a registry office, concurrent notice is impossible.

A. Current information is not the same as future information.

The government spends much time trying to explain why keeping a registration "current" would include reporting future information. U.S. Br. 11, 15, 18-19. For instance, the government confusingly opines that "an offender may indeed provide information about what his residence will be (or not be) in the future, in order to keep his registration information 'current.'" *Id.* 15. In support, the government unhelpfully cites the Dictionary Act for the proposition that words used in the present tense include the future tense. Br. 19. But the word "current" is not a present-tense verb. Each time Congress uses the word "current," it does not also mean "future." If that were true, the requirement in 42 U.S.C. § 16916 that an offender "allow the jurisdiction to take a current photograph" at each in-person verification would allow for a "future photograph" instead. This is not a plausible interpretation of the word "current." Section 16913(c)'s aim is to keep "the registration current," not to keep the registration "future." And a current registration does not include future information, just as a current photograph is not a future photograph.

B. A change, not an anticipated change, triggers a registration obligation under SORNA.

1. The Tenth Circuit affirmed Mr. Nichols's conviction because of his failure to update his registration after (not before) he changed residences. J.A.

125-126 (the change of residence "triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill"). *See also United States v. Murphy*, 664 F.3d 798, 801 (10th Cir. 2011) (a "change of residence" "sparks a reporting duty"); *United States v. Lunsford*, 725 F.3d 859, 861 (8th Cir. 2013) (a "change of residence" "triggers an obligation" to register).

The government does not dispute that a "change" triggers a reporting obligation. U.S. Br. 27. It concedes that pre-departure notification is not a requirement in all cases. *Id.* 21. But it contends that a failure to provide notice is a federal crime if the offender cannot register in a new jurisdiction within the three-business-day deadline. *Id.* 21-22. Even then, though, this notice does not fulfill § 16913(c)'s reporting obligation if the offender moves to a jurisdiction covered by SORNA. This offender, according to the government, must still register in the new jurisdiction. *Id.* Only if the offender moves to a jurisdiction not covered by SORNA is pre-departure notification required by SORNA. *Id.* 18, 26.[6]

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[6] This case does not turn on whether a move from point A to point B constitutes one or two "changes of residence." If the government is correct, however, that a move from point A to point B constitutes two changes of residence, U.S. Br. 21, then an offender effectively has a minimum of two separate three-business-day periods to report the changes. The offender can spend as much as five days in the departure jurisdiction before telling the jurisdiction that he has abandoned his residence, then the offender has another five days upon arrival to register a new address in the arrival jurisdiction. Thus, an offender

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Of course, the statute does not say any of this. The statute does not set forth a conditional obligation to unregister in cases where registration within three days is not required or impossible. To the extent that registration is impossible, 18 U.S.C. § 2250(b) (now § 2250(c)) provides an affirmative defense to prosecution.

2. The government does not explain how an offender would know about this federal conditional obligation. As previously explained, the phrase "not later than 3 business days after" is naturally read as a triggering event which then requires registration. Pet'r Br. 33-37 Especially with respect to § 16913(b), the government's silence is critical.

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effectively has ten days to report a new address in a new jurisdiction, which is exactly the time period required in SORNA's predecessor legislation. 42 U.S.C. § 14072(g) (2000). But SORNA "imposed somewhat different limits upon the frequency with which offenders must update their registrations." *Kebodeaux v. United States*, 133 S.Ct. 2496, 2504 (2013). In contrast to its position here, the government's brief in *Kebodeaux* contrasted Texas's registration requirement, which required registration both before and after a change of residence, with SORNA's requirement. *See* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-418_pet.authcheckdam.pdf at 46 (last visited February 17, 2016).

The government's position also does nothing to address "residency limbo," as the government never indicates what an offender must do, or when he must do it, between departure notification and arrival in a new jurisdiction.

In two clearly delineated subsections in § 16913(b), Congress expressly accounted for initial registration of convicted sex offenders: "(1) before [a triggering event]; or (2) not later than 3 business days after [a triggering event]." Pet'r Br. 11a. The government offers no reason why Congress, in the next subsection, would have replaced this express dichotomy for an implicit sometimes-permissive-sometimes-required conditional obligation. If Congress wanted to require the offender, in certain circumstances, to give notice "before" the "change," it would have set forth this requirement within the text of § 16913(c), in a manner structurally similar to § 16913(b). *See, e.g.*, *Credit Suisse Securities v. Simmonds*, 132 S.Ct. 1414, 1420 (2012) ("Had Congress intended this result, it most certainly would have said so.").

Section 16913(c) plainly requires an offender to update a sex offender registry, but only after the offender changes his name, residence, employment, or student status. Until the change occurs, an offender is not "required by" SORNA, 18 U.S.C. § 2250(a)(3), to update the information in the registry.

C. Section 16914(a)(3) is not a departure notification provision.

Section 16914 is a non-exhaustive list of information to be included in sex offender registries. This information would be reported at initial registration and periodically "verified," 42 U.S.C. § 16916. As just discussed, § 16913(c) also requires an offender to

update the information "not later than three business days after" an enumerated change. Until a "change" occurs, however, an offender is not required to inform an involved jurisdiction of changes in the § 16914 registration information. SORNA's plain text did not require an offender to report changes to this information at other times.

1. Section 16914(a)(3) lists "[t]he address of each residence at which the sex offender resides or will reside." The government cites "will reside" in support of its conditional pre-departure notification requirement. U.S. Br. 11, 19-21, 26. But the government never acknowledges that, prior to the recent amendment, § 16914 did not include its own time and manner provision. Without such a provision, nothing within SORNA required an offender to provide any information within § 16914 at times other than initial registration, periodic verifications, or within three business days of an enumerated change in § 16913(c). To require updated information at other times would render these timing requirements meaningless. Pet'r Br. 33-37.

2. Congress instead included "will reside" in § 16914(a)(3) to cover situations where offenders initially register in prison, as the government itself recognizes. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030-01 at 38055 (July 2, 2008). The government downplays this statement as just one example, and now quotes from two other sections in the guidelines. U.S. Br. 20. But the guidelines do not include another example

beyond the situation where an offender "is not yet residing in the place or location to which he or she expects to go following release." 73 Fed. Reg. 38030-01 at 38055. And the other two quotes, which instruct *jurisdictions* (not sex offenders) to require departure notification, do not cite or rely on § 16914(a)(3) as the underlying authority. U.S. Br. 20 (citing 73 Fed. Reg. 38030-01 at 38065, 38067).[7]

The government also criticizes the argument as "[l]acking support in the statute itself." There is statutory support, however. *See* 42 U.S.C. §§ 16913(b)(1) (requiring registration while in prison), 16917(a)(3) (requiring law enforcement to ensure that offenders register in prison), 16921(b)(3) (requiring law enforcement to provide information to a jurisdiction "to which" a change of residence occurs).

3. In 18 U.S.C. § 4042(c), Congress directed the Bureau of Prisons to provide notification when a sex offender is released from custody, parole, probation, or supervised release. The provision requires the Bureau of Prisons to notify officials in the jurisdiction "in which the person will reside." *Id.* This provision confirms that an offender serving a term of imprisonment reports his future address prior to his release from prison and that Congress's parallel use of "will

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[7] Many offenders are released to halfway houses as a transition from prison to the community. 18 U.S.C. § 3624(c). This fact might explain why the guidelines include the phrase "for example" when referring to release "from imprisonment."

reside" in § 16914(a)(3) was similarly aimed at this scenario.

4. The House Report summarizes § 16914(a)(3)'s requirements in the singular, not the plural. House Report 46 (a sex offender must provide "the sex offender's address"). It does the same with employment and student status. *Id.* This summary is further evidence that Congress included "will reside" in § 16914(a)(3) to ensure that prisoners report a future, post-release address, and not the address of the prison.

5. Even if "will reside" means something more, it does not mean "will no longer reside." The government's argument is not that Mr. Nichols failed to tell Kansas where he "will reside" in the Philippines, but that he failed to tell Kansas that he "will no longer reside" in Kansas. U.S. Br. 21. But a requirement to report a future address is not the same as a requirement to unreport a soon-to-be past address. Congress could have said "resides, will reside, or will no longer reside," but it did not. Section 16914(a)(3) is not a departure notification provision.

6. Finally, Mr. Nichols's conviction was not affirmed on appeal because he failed to update the § 16914 information before the change of residence. The question presented involves a failure to update after the change, as required by § 16913(c). It would be improper to affirm the conviction on a ground outside of the question presented. *West v. Gibson*, 527 U.S. 212, 223 (1999) (remanding case after refusing to

consider matters outside the scope of the question presented).

V. The government misreads SORNA's statutory history, misconstrues the guidelines, and confuses the question presented with its discussion of transient sex offenders.

1. Citing § 16921(b)(3)'s requirement that a jurisdiction report information "from or to which a change of residence" occurs, the government contends that SORNA "replaced a one-way flow of information (from the departure jurisdiction to the new one) with a system that allows information to flow in either direction." U.S. Br. 38. The government is wrong. This two-way system existed prior to SORNA. 42 U.S.C. §§ 14072(g)(4), (g)(5) (2000). The relevant difference between SORNA and its predecessor statute is that SORNA, prior to the recent amendment, did not include a departure notification provision. Pet'r Br. 52-59. The government never explains away that distinction.

2. The government also misreads its own guidelines. The government implies that the guidelines are aimed at sex offenders, rather than at the jurisdictions responsible for administering sex offender registries. U.S. Br. 20. The government is wrong. The guidelines instruct jurisdictions, not sex offenders. 73 Fed. Reg. 38030-01 at 38030 ("These final guidelines provide guidance and assistance to the states and

other jurisdictions."); 42 U.S.C. § 16912(b) (delegating the authority to issue guidelines "for jurisdictions").

The guidelines further recognize that "requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move" is a "more stringent" requirement than "the SORNA minimum standards." 73 Fed. Reg. 38030-01 at 38046. This is our point. The government counters that this is only a "more stringent requirement" when an offender cannot register in the arrival jurisdiction. U.S. Br. 29. But the "International Travel" section states that any requirement to report such travel does not fall under § 16913(c), but instead would be "matters that jurisdictions may determine in their discretion." 73 Fed. Reg. 38030-01 at 38066. The recent amendment, which does not amend § 16913(c), confirms that moves to foreign countries are not governed by § 16913(c).

3. Finally, the government invokes the "transient sex offender" to lend support for its sometimes-permissive-sometimes-required, unregister-first-then-register-second conditional obligation in § 16913(c). U.S. Br. 23. But this case is not about a transient sex offender. Mr. Nichols moved from Kansas to the Philippines. The government confuses the issue when it brings in collateral matters.

Thus, it is not that it is impossible "to explain how a sex offender who takes more than three business days to move can still comply with SORNA,"

U.S. Br. 23, it is that there is no need to explain it. If there were a need, SORNA's text answers the question, just as it answers the question presented in this case. *See* 42 U.S.C. § 16911(13) (defining the term "resides" to include a "place where the individual habitually lives"); 18 U.S.C. § 2250(b) (now § 2250(c)) (providing an affirmative defense to prosecution if an individual's failure to comply with SORNA results from uncontrollable circumstances not recklessly contributed to by the defendant).

Moreover, the vast majority of state registration statutes expressly cover transient offenders. Kansas, for instance, obligates transients to report in person at least every 30 days. Kan. Stat. § 22-4905(e). Other states have similar transient check-in requirements ranging from daily (*e.g.*, Vt. Stat. Ann. tit. 13, § 5407(h)), to weekly (*e.g.*, Ala. Code § 15-20A-12) to monthly (*e.g.*, Fla. Stat. § 943.0435(4)(b)(2)). As with other aspects of registration, the states have properly taken the lead to register offenders within their borders.

The question presented is not whether or how a homeless sex offender must register. The question is whether it was a federal crime to move to a foreign country without unregistering in a former jurisdiction. The plain text of SORNA answers that question in the negative.

VI. If nothing else, the rule of lenity controls.

The government cites this Court's precedent requiring a "grievous ambiguity" to invoke the rule of lenity. U.S. Br. 40. But this Court does not always require a "grievous ambiguity." Pet'r Br. 60-62. Instead, the question often asked is whether the government's position is unambiguously correct. *United States v. Granderson*, 511 U.S. 39, 54 (1994). As a textual matter, the answer is no. The government's argument is not rooted in SORNA's text, but rather in its "context." U.S. Br. 14. The government asks what SORNA "contemplates," not what SORNA says. *Id.* 17. It looks beyond the text to "capture the meaning" of § 16913(c). *Id.* 24. It considers "current" information analogous with "future" information. *Id.* 26. It cobbles together a conditional obligation to provide information at a time and in a manner different than the text requires. *Id.* 21-26. The government's atextual argument is not unambiguously correct. The passage of International Megan's Law confirms this. If nothing else, the rule of lenity controls.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, this Court should reverse the Tenth Circuit's judgment affirming Mr. Nichols's conviction.

Respectfully submitted,

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